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No. 03-1089

Supreme Court, U.S.
FILED
MAR 15 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ARTISTIC ENTERTAINMENT, INC., et al.,

Petitioners,

vs.

CITY OF WARNER ROBINS, GEORGIA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner, Artistic Entertainment, Inc., d/b/a Teasers, is an adult entertainment establishment located in Warner Robins, Georgia, that offers nude dancing and sells alcoholic beverages for consumption on the premises. (R1-1-Ex. A-1-2).[1] On January 6, 1997, the City conducted a hearing to examine and evaluate the impact of adult entertainment establishments on the surrounding neighborhoods of the cities of Warner Robins and Perry and Houston County, Georgia "in order to determine whether in the interests of health, safety and welfare of the citizens of these three political bodies, it is necessary or desirable to adopt local legislation concerning the location or the regulation of adult entertainment establishments." (Ex. 27-34, Defs' Ex. 2 thereto, p. 5). In advance of the hearing, the City Council members were provided with certain written materials and studies for their examination. (*Id.* at 5-6; R1-25-Defs' Ex. A). Following the hearing, and before enactment of the Ordinances, the City Council received an affidavit from Warner Robins Police Chief Dan Hart showing that a higher number of service calls was made by his Department to Petitioner's place of business during the year 1996 than to three other lounges that also sold alcoholic beverages but did not offer nude dancing. (R1-21-Defs' Ex. 2, Ex. A; R1-25-Ex. B).

Subsequent to the evidentiary hearing, on March 3, 1997, the City enacted an Ordinance Regulating Adult Businesses, Ordinance 18-97. (R1-21-Defs' Ex. 1, item 3)

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[1] Citations to the record reflect volume numbers and docket entries as set forth in the Record Index before the Eleventh Circuit Court of Appeals.

(hereinafter the "Adult Ordinance"). On March 3, 1997, the City also enacted Ordinance 19-97, which amended its alcoholic beverage ordinance. (R1-21-Defs' Ex. 1, item 2) (hereinafter the "Alcohol Ordinance"). The Adult Ordinance contains a severability clause which states that "If any section, subsection, subdivision, paragraph, sentence, clause or phrase in this ordinance, or the application thereof to any circumstances, is for any reason held to be unconstitutional or invalid or ineffective by any court of competent jurisdiction, such decision shall not affect the validity or effectiveness of the remaining portions of this ordinance." (R1-21-Defs' Ex. 1, item 3, section 1.170).

This case made three trips to the Eleventh Circuit Court of Appeals. In the first appeal, in an unpublished opinion, the Eleventh Circuit vacated the District Court's Order enjoining enforcement of the ordinances, "finding that [the District Court] had not accorded sufficient weight to the evidentiary basis that supported adoption of the ordinances." *Artistic Entertainment, Inc. v. City of Warner Robins*, 331 F.3d 1196, 1999 (11th Cir. 2003) (summarizing prior unpublished opinion). Upon remand of the case to the district court, the parties engaged in extensive discovery. Petitioner served interrogatories and requests for admissions and for production of documents. The parties conducted 10 depositions. (R2-76-3). In the second appeal, the Eleventh Circuit concluded that the challenged ordinances were subject to intermediate scrutiny, and that the Respondent had an adequate basis for concluding that a proscription on the sale and consumption of alcohol at adult businesses would reduce crime and other social costs associated with those businesses. *Artistic Entertainment, Inc. v. City of Warner Robins*, 223 F.3d 1306, 1308-10 (11th Cir. 2000). However, the Eleventh Circuit concluded the

Adult Ordinance operated as a prior restraint on protected speech "because it did not provide for an applicant's unconditional right to begin operating his business if the City failed to act on his application for a license within the time required." *Artistic*, 223 F.3d at 1310-11.

On September 5, 2000, the Warner Robins City Council enacted An Ordinance to Amend the Ordinance Regulating Adult Businesses No. 57-00. (R2-73, Ex. A) (hereinafter the "Amending Ordinance"). The Amending Ordinance provides, in part, as follows:

> If the City Council has not approved or disapproved an application for a license within forty-five (45) days from the date such application was received by the City Clerk, then on the expiration of the forty-fifth (45th) day: (1) the application shall be approved and the City Clerk shall immediately issue the license for which application was made, and (2) the applicant shall have the right to begin operating in the manner allowed by the license for which application was made.

(R2-73, Ex. A).

The District Court held a status conference on April 3, 2001, at which it requested the parties submit letter briefs on the remaining issues in the case. (R2-65). On April 16, 2001, the District Court ruled that the parties had thirty days within which to file motions concerning whether or not the Amending Ordinance cured the prior restraint problem. (R2-68-5). Respondent filed a motion for summary judgment on May 15, 2001, arguing that the Amending Ordinance had cured the prior restraint problem. (R2-70). Petitioner filed a motion seeking to supplement its original complaint and launch a new period of discovery. (R2-72). Respondent did not oppose Petitioner's motion to

file a supplemental complaint, to the extent that was necessary to formally put at issue the question whether the Amending Ordinance cured the prior restraint problem with the Adult Ordinance. (R2-75). Respondent opposed additional discovery, however, because the issues could be decided on the record. (R2-76). The Eleventh Circuit's third decision in this case best summarizes the proceedings as follows:

> In the context or these pending motions, . . . the district court granted Artistic's motion to file an amended complaint but, finding the Amending Ordinance was valid, also granted the City's motion for summary judgment. Finding that additional discovery would not be helpful, the district court denied Artistic's request to reopen discovery.

Artistic, 331 F.3d 1200-01 (Pet. App. pp. 4-5).

REASONS FOR DENYING THE WRIT

Petitioner has phrased the first question presented as follows: "When the federal judiciary declares a law facially invalid, does any portion of that law remain valid for purposes of suppressing free speech?" Neither the Eleventh Circuit's ruling in *Artistic Entertainment, Inc., et al., v. City of Warner Robins*, 331 F.3d 1196 (11th Cir. 2003) nor the record below, raises the question presented by the Petition. Contrary to the characterization posed by the first question presented, the Eleventh Circuit concluded that "no part of the Adult Ordinance survived our decision in Artistic Entertainment [223 F.3d 1306], because the entire ordinance is dependent upon a valid licensing regime." *Artistic*, 331 F.3d at 1204 (Pet. App. p. 13). The

Eleventh Circuit continued, stating that "the Amending Ordinance [Ordinance 57-00, Petition, pp. 2-5] is valid only if it stands as an entirely 'new' ordinance." *Artistic*, 331 F.3d at 1204 (Pet. App. p. 13). Clearly, the Eleventh Circuit's decision in *Artistic* does not raise the question presented, as framed by Petitioner.

Citing *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2001), Petitioner argues that it was "deprived of an opportunity to challenge the factual predicate supporting the Amending Ordinance in accordance with *Alameda Books*." (Pet. p. 14). Petitioner asserts that "Artistic submitted evidence which made the inference appear unreasonable that nude dancing in taverns creates adverse secondary effects." (Pet. p. 14). Petitioner then misstates the factual record by stating that "[t]he City did not rebut Artistic's evidence, except to provide the deposition testimony of the Garden Grove study's authors, who candidly disavowed any basis in their study for believing that nudity and alcohol generated adverse secondary effects." (Pet. p. 14). One of the studies relied on by the City when enacting the Adult Ordinance was the "Final Report to the City of Garden Grove: The Relationship Between Crime and Adult Business Operations on Garden Grove Boulevard" authored by Professors Richard McCleary and James W. Meeker. (Ex. 50, Pl. Ex. B; Meeker Depo., Pl. Ex. B) (hereinafter the "Garden Grove study"). Contrary to the representations of Petitioners, Professors Meeker and McCleary were unequivocal in their depositions that there is a strong correlation between adult entertainment and negative secondary effects, such as increased crime, decreased property values, and decrease in quality of life, (Ex. 50-33, Meeker Depo. p. 33; Ex. 51-46-49, McCleary Depo. pp. 46-49), and both were unequivocal that the sale

or consumption of alcohol in conjunction with adult entertainment would only exacerbate those negative secondary effects. (Ex. 51-46-49; McCleary Depo. pp. 46-49; Ex. 50-14-15, Meeker Depo. pp. 14-15). Professors Meeker and McCleary also expressed their expert opinion that the Garden Grove was relevant to the question of whether or not adult entertainment establishments are associated with an increase in negative secondary effects, even if one accepts the proposition that Teasers does not generate any increase in crime. (Ex. 50-29-30, Meeker Depo. pp. 29-30; Ex. 51-46-49, McCleary Depo. pp. 46-49). Other than rhetoric, and a misrepresentation of the factual record, Petitioner does not show how the Eleventh Circuit's decision in *Artistic* "decides an important federal question in a way that conflicts with relevant decisions of this Court." (Rule 10(c)).

The Eleventh Circuit in *Artistic* concluded that the City was entitled to rely on the original evidentiary support for the Adult Ordinance when it readopted the Amending Ordinance. *Artistic*, 331 F.3d at 1205 (Pet. App. pp. 15-16). The Court stated that "the City adopted an ordinance almost identical to the original Adult Ordinance, making a slight adjustment designed and intended to correct the prior restraint problem found by this court. We cannot say that in enacting the Amending Ordinance the City's reliance on its own evidentiary basis compiled in support of the Adult Ordinance, which we specifically found adequate, was 'unreasonable.'" *Id.* (Pet. App. pp. 15-16). The Eleventh Circuit's decision is not in conflict with *Alameda*. This Court has stated that "we must grant certiorari only in those cases that will enable us to resolve particularly important questions," *Yee v. City of Escondido*,

502 U.S. 519, 536 (1992), and a grant of certiorari in this case will not further that goal.

Petitioner framed the second question presented as follows: "In a first amendment case, can the district court *sua sponte* grant summary judgment against proposed supplemental claims without first providing notice to the party proposing these claims?" (Pet. p. 1). Petitioner has framed the question presented in a manner that misstates the proceedings below. The Eleventh Circuit's opinion in *Artistic* makes clear that in the context of the underlying litigation, "Artistic had sufficient notice that the court might rule on the supplemented claims." *Artistic*, 331 F.3d at 1203 (Pet. App. p. 9). Indeed, the District Court notified the parties that they had thirty days to present motions related to the issue whether or not the prior restraint problems with the Adult Ordinance had been cured. (R2-68; April 16, 2001 Order). The Eleventh Circuit's conclusion in *Artistic* that "summary judgment is entirely appropriate even if no formal notice has been provided" when the legal issue has been fully developed and the evidentiary record is complete, *Artistic*, 331 F.3d at 1202 (Pet. App. pp. 7-8), is not such a departure from the accepted and usual course of judicial proceedings so as to warrant review by this Court. *Cf.* Rule 10(a). In essence, by partially granting Petitioner's Motion to Supplement the Complaint, the District Court simply amended the pleadings to conform to the evidence at the time the City filed its Motion for Summary Judgment. *Cf. Putnam v. Williams*, 652 F.2d 497, 499 (5th Cir. Unit B Aug. 1981) ("in considering a motion for summary judgment, the pleadings may be treated as though they had been amended to conform to the evidence filed with the motion when not objected to by the opposite party").

Petitioner also argues that the Eleventh Circuit's decision in *Artistic* decides an important federal question in a way that is in conflict with a decision of the Georgia Supreme Court. (Petition, p. 16). Petitioner fails to identify a single decision of the Georgia Supreme Court that is in conflict with the decision of the Eleventh Circuit in *Artistic*. In contrast to the sensational rhetoric in the Petition, the Eleventh Circuit clearly stated that the Amending Ordinance "is valid only if it stands as an entirely 'new' ordinance." *Artistic*, 331 F.3d at 1204 (Pet. App. p. 13). The Court noted that the evidentiary basis for the Adult Ordinance had been found adequate in its previous decision, *Artistic*, 331 F.3d at 1205 (Pet. App. 15) (citing *Artistic Entertainment v. City of Warner Robins*, 223 F.3d 1306, 1309 (11th Cir. 2000)), and it concluded that the Respondent reasonably could rely on the original evidentiary support for the Adult Ordinance when enacting the Amending Ordinance. *Artistic*, 331 F.3d at 1205 (Pet. App. p. 16). The Eleventh Circuit also held that the Alcohol Ordinance appropriately incorporated by reference the definitions of "specified anatomical areas" and "specified sexual activity" set forth in the Adult Ordinance. *Artistic*, 331 F.3d at 1206-07 (Pet. App. pp. 16-19).

The Eleventh Circuit stated that "[w]e are aware of no authority to the effect that a definition incorporated by reference into another otherwise valid ordinance (for example, the Alcohol Ordinance) ceases to be an operative definition just because it derives from a referenced ordinance (for example, the Adult Ordinance) that was declared unconstitutional for reasons having nothing to do with the definition." *Artistic*, 331 F.3d at 1206 (Pet. App. pp. 17-18). Neither in proceedings before the Eleventh Circuit nor in the Petition before this Court, has the

Petitioner set forth any controlling authority that the procedure employed by Respondent of incorporating certain definitions by reference was constitutionally infirm, or that the decision of the Eleventh Circuit is in conflict with a decision of the Georgia Supreme Court.

CONCLUSION

The decision of the Eleventh Circuit is not in conflict with decisions of other United States courts of appeal, the Georgia Supreme Court, or decisions of this Court. At best, Petitioner is simply complaining that the Eleventh Circuit misapplied a properly stated rule of law. Petitioner has not set forth compelling reasons for granting a writ of certiorari. Granting certiorari in this case will not further the Court's goals of granting certiorari "only in those cases that will enable us to resolve particularly important questions." *Yee*, 503 U.S. at 536. Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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